



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 18, 1997

Mr. Morris Sandefer  
Commissioner  
Fire Fighters' Pension Commission  
P.O. Box 12577  
Austin, Texas 78711

Letter Opinion No. 97-113

Re: Proposed changes to Corpus Christi Fire  
Fighters' Retirement System benefits plan  
(ID# 39622)

Dear Commissioner Sandefer:

The Board of Trustees of the Corpus Christi Fire Fighters' Retirement System proposes changes to its retirement plan. Two of the proposed changes would increase the amount of benefits paid to certain retired fire fighters already receiving retirement payments. A third change would reduce the amount of benefits that active fire fighters currently contributing to the plan could receive upon their retirement. Your predecessor in office asked if the proposed changes violate Texas law. We conclude that the first two changes are not prohibited by article III, section 53 of the Texas Constitution. We are unable to determine whether the third change unlawfully deprives fire fighters with twenty or more years of service of a vested right.

The Corpus Christi Fire Fighters' Retirement System was created pursuant to V.T.C.S. article 6243e, the Texas Local Fire Fighters Retirement Act (the "act").<sup>1</sup> The act establishes a retirement system and trust fund in each city covered by the act.<sup>2</sup> Contributions to a system are made by current fire department employees and by the city whose employees are participating in the system.<sup>3</sup> The act sets the minimum requirements for each system benefits plan, including the minimum amounts

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<sup>1</sup>Article XVI, section 67 of the Texas Constitution authorizes the legislature to enact "general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers." Tex. Const. art. XVI, § 67(a)(1). With respect to local retirement systems, article XVI, section 67 requires the legislature to provide by law for "the creation by any city or county of a system of benefits for its officers and employees" and "a statewide system of benefits for officers and employees of cities in which cities may voluntarily participate." *Id.* § 67(c)(1). Benefits under these systems must be reasonably related to participant tenure and contributions. *Id.* § 67(c)(2). Article XVI, section 67 was added to the constitution in 1975, and provides that laws establishing retirement systems in effect at the time of its adoption remain in effect. *Id.* § 67(a)(4).

<sup>2</sup>V.T.C.S. art. 6243e, § 4.

<sup>3</sup>*Id.* § 29.

that a participant is entitled to collect for service retirement, disability retirement, and death benefits, and the criteria for eligibility to receive benefits.<sup>4</sup>

The board of trustees of the retirement system for each city may make changes to the statutorily prescribed retirement plan, provided the changes do not conflict with the requirements of the act, as follows:

Sec. 7. (a) The board of trustees of a retirement system may change the benefits or eligibility requirements for benefits payable from the retirement system, may provide for reinstatement by a member of service credit previously forfeited, and may adopt or change other requirements for the payment of benefits, except as otherwise provided by this Act.

V.T.C.S. art. 6243e, § 7(a). Before the board adopts or changes a benefit, the proposed addition or change must be approved by an actuary selected by the board and by a majority of the participating members of the retirement system in an election held for that purpose.<sup>5</sup>

With respect to who is affected by a plan change, section 7 of the act provides as follows:

(d) Except as provided by Subsection (e)<sup>6</sup> of this section, if a board chooses to adopt an addition or change after it has been approved as provided by this section, the addition or change applies to all persons who are participating members of the retirement system on the effective date of the addition or change and all persons who became participating members during the time the addition or change remains in effect. The addition or change also may apply to:

(1) persons receiving monthly benefits; or

(2) former members of the fire department who meet an applicable length-of-service requirement for service retirement.<sup>7</sup>

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<sup>4</sup>*Id.* §§ 4, 12, 14, 15.

<sup>5</sup>*Id.* § 7(b).

<sup>6</sup>Subsection (e) prohibits a plan addition or change from depriving a retirement system member of a right to receive a vested benefit, unless the member consents in writing to the addition or change. *Id.* § 7(e) (footnote added).

<sup>7</sup>*Id.* § 7(d) (footnote added).

Thus section 7 provides that any change to a benefits plan may apply to “persons receiving monthly benefits” or “former members of the fire department who meet an applicable length-of-service requirement for retirement service.”<sup>8</sup>

The terms of the benefits plan for the Corpus Christi Fire Fighters’ Retirement System are set out in the system’s “Plan Document.” Intending to make changes to the plan, the board of trustees obtained an actuary’s approval and conducted a benefit election in accordance with the requirements of section 7.<sup>9</sup> We first consider whether two changes approved by the members that would increase the amount of benefits payable to retirees already receiving monthly payments from the plan violate article III, section 53 of the Texas Constitution.

Article III, section 53 prohibits a county authority from granting “any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part.” It is well established that a retirement plan authorized by statute constitutes part of an employee’s compensation, and benefits received pursuant to the plan are not “extra compensation” for services already rendered.<sup>10</sup> It is equally well established that the law governing a retirement plan becomes a part of the contract of employment of an employee participating in the plan, and the employee is entitled to participate in the plan upon the terms prescribed by statute.<sup>11</sup>

To determine whether a retiree constitutionally may receive a post-retirement increase in benefits, courts look to the retirement plan and the law governing the plan in effect when the employee entered retirement status, as illustrated by the case of *City of Greenville v. Emerson*.<sup>12</sup> In *Emerson*, a group of retired fire fighters argued that the city contractually agreed to change the city’s method of calculating retirement benefits.<sup>13</sup> Had the city used the new method, when the fire fighters retired they would have been entitled to a higher lump-sum retirement payment. The retirees alleged that the city agreed to apply the new method to the retirees and pay them the amount they would

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<sup>8</sup>*Id.* § 7(d).

<sup>9</sup>We have received correspondence indicating that some members of the system contest the results of the benefits election. We do not determine in this opinion whether the proposed changes were properly approved by plan members at an election or by an actuary.

<sup>10</sup>See *Byrd v. City of Dallas*, 6 S.W.2d 738, 740-41 (Tex. 1928); *City of Corpus Christi v. Herschbach*, 536 S.W.2d 653, 657 (Tex. Civ. App.—Corpus Christi 1976, writ ref’d n.r.e.); *Devon v. City of San Antonio*, 443 S.W.2d 598, 600 (Tex. Civ. App.—Waco 1969, writ ref’d); *City of Dallas v. Trammel*, 96 S.W.2d 110, 111 (Tex. Civ. App.—Dallas 1936), *rev’d on other grounds*, 101 S.W.2d 1009 (Tex. 1937); Attorney General Opinion DM-265 (1993) at 3.

<sup>11</sup>See *Byrd*, 6 S.W.2d at 740-41; *Ward v. City of San Antonio*, 560 S.W.2d 163, 165-66 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.); *Devon*, 443 S.W.2d at 600; see also *City of Orange v. Chance*, 325 S.W.2d 838, 840 (Tex. Civ. App.—Beaumont 1959, no writ) (holding that “the prohibition [on extra compensation] does not apply to payment of any fund or sum based upon the contract of employment”).

<sup>12</sup>740 S.W.2d 10 (Tex. App.—Dallas 1987, no writ).

<sup>13</sup>*Id.* at 11-12.

have received had the method been applied when they retired. The court held that such an agreement would violate article III, section 53 of the constitution, because it would require the city to pay additional sums of money for services already rendered and benefits already paid. "In effect, it would constitute Greenville entering into a second contract with appellees to pay them additional benefits above what they received under a prior valid existing contract for no additional consideration."<sup>14</sup> The court held the fire fighters to the terms of the retirement plan as it existed at the time of their retirement.

This office applied the same reasoning in Attorney General Opinion DM-265 (1993) to reach a different result. At issue in that opinion was whether the annual distribution of extra interest by the Texas County and District Retirement System to annuitants constituted extra compensation for no additional consideration in violation of the constitution. We concluded that because the distribution of extra interest was expressly authorized by statute and was a feature of the retirement plan when the annuitants became members of the retirement system, the extra interest did not constitute "unbargained-for, retroactive compensation."<sup>15</sup>

In this case, section 7(d) of article 6243e expressly permits plan benefits changes to apply to persons already receiving monthly benefits. Section 7(d) became part of the contract of employment of fire fighters participating in the plan.<sup>16</sup> An increase in benefits made pursuant to the provision is part of the employee's agreed compensation and is not extra compensation in violation of article III, section 53.

We next consider the proposed change to the Plan Document that would decrease the amount of future benefits payable to currently active fire fighters upon their retirement. Your predecessor has told us that in December 1989, the board of trustees adopted a modification to the Plan Document whereby post-retirement benefits would increase by fifty percent of any increase in the benefit level applicable to active fire fighters upon their retirement. In other words, if the level of benefits payable to active fire fighters upon retirement is increased, the benefits paid to already retired fire fighters is increased by fifty percent of that amount. This year, the board proposes amending the Plan again to reduce the increase for retired fire fighters from fifty percent to twenty-

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<sup>14</sup>*Id.* at 13.

<sup>15</sup>*Id.* at 3. The question posed in Attorney General Opinion DM-265 was whether the interest payment violated article III, section 52 of the Texas Constitution, which prohibits the legislature from authorizing a political subdivision to "lend its credit or to grant public money or thing of value in aid of" any private individual or entity. We concluded that the payment violated neither this provision nor article III, section 53. *Id.* at 4 n.3.

<sup>16</sup>See Act of May 21, 1973, 63d Leg., R.S., ch. 486, 1973 Tex. Gen. Laws 1296, 1296 (providing that a "change or modification may, but need not, apply to firemen no longer in the department who are either receiving or are entitled to receive benefits under the department's pension plan"). Section 7(e)'s predecessor was enacted in 1973. Prior to 1973, the act provided that any change or modification in benefits "applies only to active full time firemen in the department at the time of the change or modification and those who enter the department thereafter." Act of May 29, 1969, 61st Leg., R.S., ch. 768, 1969 Tex. Gen. Laws 2281, 2281. We stated in Attorney General Opinion M-631 (1970) that this provision "preclude[d] any pension modification or change in the form of an additional lump sum payment in pension benefits to retired firemen or their survivors."

five percent of any increase applicable to active fire fighters. Retirees who retired before the effective date of the change would continue to be entitled to receive an increase of fifty percent. We understand that active fire fighters who have completed twenty years of service object to the proposed change on the grounds that it deprives them of a vested benefit.

Section 7(e) of the act prohibits any benefit change that would “deprive a member of the retirement system of a right to receive a vested benefit” unless the member consents in writing to the change. Thus section 7(e) requires us to determine whether the Plan Document’s post-retirement benefits increase provision created a “vested benefit.”

A “vested” right is defined in Texas as a right that is “more than a mere expectancy based on an anticipated continuance of an existing law.”<sup>17</sup> The right “must have become a title, legal or equitable, to the present or future enforcement of a demand.”<sup>18</sup> We stated in Letter Opinion No. 95-089 (1995) that “[w]hether a benefit has vested appears to be governed by each retirement system’s individual benefits plan” and involves questions of fact. We have been shown Article IV of the Plan Document, which provides that a fire fighter is “100% vested at all times with the respect to the amounts he or she has contributed to the Plan,” and becomes “100% vested in his respective benefits under the plan upon completion of twenty (20) Years of Service, upon becoming Totally Disabled, or upon his death.”<sup>19</sup> At the same time, another portion of the plan states that an amendment to or elimination of the plan provision providing for a post-retirement benefits increases “shall not be deemed to deprive any existing Participant, Retiree, or beneficiary of any benefits under the Plan.” As we do not have the entire Plan Document before us, and, in any event, because we normally do not construe contracts or decide issues of fact in the opinion process, we are unable to determine whether the third proposed change unlawfully deprives fire fighters with twenty or more years of service of a vested benefit.<sup>20</sup>

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<sup>17</sup>*Walls v. First State Bank of Miami*, 900 S.W.2d 117, 121-22 (Tex. App.—Amarillo 1995, no writ) (citing *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937)).

<sup>18</sup>*Id.* at 122 (citing *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 284 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.)).

<sup>19</sup>The board of trustees argues that although a fire fighter with twenty years of service becomes vested “in his benefits under the plan,” the fire fighter becomes vested only in the dollar amount he or she is eligible to receive upon retirement and does not acquire a vested right to post-retirement increases until he or she has entered retirement and is no longer an active employee. While the determination of this issue is best made by an appropriate fact finder, we find nothing in the materials provided to us that supports that view. We note the line of cases holding that a person who has served in the armed forces acquires a vested property right in military retirement benefits when the person has served the number of years that entitle the person to retire, whether or not the person has retired. *Busby v. Busby*, 457 S.W.2d 551, 553-55 (Tex. 1970); *Taggart v. Taggart*, 540 S.W.2d 823, 825 (Tex. Civ. App.—Corpus Christi 1976), *rev’d on other grounds*, 552 S.W.2d 422 (Tex. 1977); *Mora v. Mora*, 429 S.W.2d 660, 662 (Tex. Civ. App.—San Antonio 1968, writ dismissed w.o.j.).

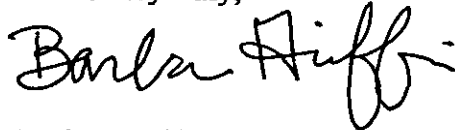
<sup>20</sup>We note that it has long been the law in Texas that a retirement plan participant’s right to receive future benefits payments, even after the participant has retired from service or after the participant’s right to receive payments has otherwise accrued, is at all times subordinate to the legislature’s right to abolish the pension system, reduce or

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S U M M A R Y

A post-retirement increase in benefits made pursuant to the Texas Local Fire Fighters Retirement Act, V.T.C.S. article 6243, section 7, for a retiree covered by the act is not "extra compensation" prohibited by article III, section 53 of the Texas Constitution.

Yours very truly,

A handwritten signature in black ink, appearing to read "Barbara Griffin". The signature is fluid and cursive, with a large initial "B" and a stylized "G".

Barbara Griffin  
Assistant Attorney General  
Opinion Committee

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<sup>20</sup>(...continued)

increase the benefits, change the eligibility for benefits, or otherwise modify the method of paying benefits. *Trammell*, 101 S.W.2d at 1012-13. We have not found any case applying the holding of *Trammell* to permit the reduction or elimination of benefits by a system's board of trustees.